No. 93-1543

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CHRISTINE MCKENNON,

Petitioner,

v.

NASHVILLE BANNER PUBLISHING CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether an employer that has violated a federal anti-discrimination law can avoid all liability if, *after* the violation has occurred, new information is discovered which the employer claims would have provided a basis for dismissing the employee *before* the violation.

PARTIES

All of the parties who participated below are set out in the caption.

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BRIEF FOR PETITIONER

JURISDICTION

The decision of the Sixth Circuit was entered on November 15, 1993. An extension of time until March 30, 1994, for filing this petition was granted by Justice Stevens. Certiorari was granted on May 23, 1994. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves the age discrimination in Employment Act, 29 U.S.C. § 621, *et seq*., which provides in pertinent part as follows:

> **§ 623. Prohibition of age discrimination**
>
> **(a) Employer practices.** It shall be unlawful for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

STATEMENT OF THE CASE

A. The Proceedings Below

This action was filed by petitioner, Christine McKennon, in the United States District Court for the Middle District of Tennessee on May 6, 1991. The complaint alleged that respondent Nashville Banner Publishing Co., her former employer, had discriminated against her in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq., and the Tennessee Human Rights Act. Tenn. Code Ann. §4-21-101, et seq. (Pet. App. 11a).

Following limited discovery, respondent filed a motion for summary judgment based on petitioner's possession of certain company documents. For the purpose of the motion, the respondent and the courts below assumed that petitioner had been the victim of age discrimination in violation of the ADEA and state law. (Pet. App. 3a).

On June 3, 1992, the district court granted respondent's motion for summary judgment, dismissing the case based on the Sixth Circuit's after-acquired information doctrine. (Pet. App. 10a-18a). The Sixth Circuit affirmed, relying on its earlier decision in *Milligan-Jensen v. Michigan Technological Univ.*, 975 F. 2d 302 (6th Cir. 1992), *cert. granted*, __ U.S. __, 125 L. Ed. 2d 686, *cert. dismissed*, 125 L. Ed. 2d 773 (1993). Under the Sixth Circuit holding in *Milligan-Jensen*, a court is required, even after a finding of an intentional violation of federal law, to dismiss any employment discrimination case where the employer can show that it would have discharged the plaintiff had it been aware of information that only came to light following that violation. (Pet. App. 1a-9a).

B. The Nature of Petitioner's Discrimination Claims

Petitioner was employed by respondent since May, 1951, and held a variety of positions, working primarily as a secretary. At all times her performance was consistently rated as excellent. Respondent dismissed petitioner on October 31, 1990, when she was sixty-two years old. (Pet. App. 10a-11a).

This litigation concerns events which occurred during an eighteen-month period beginning in the spring of 1989, shortly after petitioner was assigned to work as secretary for the company's comptroller, and ending with petitioner's dismissal in the fall of 1990. The complaint alleged that respondent had engaged in three distinct types of discrimination unlawful under the ADEA and state law.

First, the complaint alleged that respondent's officials had systematically harassed petitioner in an effort to force her to retire or resign. Petitioner's benefits and privileges were reduced in a variety of ways. Respondent repeatedly admonished petitioner to retire, alleging that the company was in financial difficulty. Company officials revoked petitioner's parking privileges, reduced her lunch hour privileges, and threatened her with weekend work. (J. App. 7a-8a, 50a-52a).

Second, according to the complaint, respondent discriminated against petitioner in compensation, denying her a routine pay raise, and limiting her compensatory time. (J. App. 7a).

Third, the complaint asserted that petitioner had been dismissed on account of her age. (J. App. 8a-10a). In May, 1990, respondent hired a new secretary, age 36. On October 29, 1990, respondent hired yet another new secretary, age 26.[1] Only two days later, on October 31, 1990, respondent, asserting that it had a surplus of secretaries, dismissed the two oldest secretaries, including petitioner, then 62. (J. App. 9a). Neither of the newly hired younger secretaries was laid off. (J. App. 9a).

Respondent dismissed petitioner in a particularly abrasive manner. After almost forty years with The Banner, petitioner was summoned without warning to a meeting with company officials and notified that she was being summarily discharged. Company officials demanded that petitioner sign on the spot a five page "release agreement" that had been prepared in advance by counsel for the company, and was told that she would forfeit her severance pay if she refused. Petitioner was directed to clean out her desk and leave the building immediately. Petitioner's supervisor

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[1]Defendant's Response to Plaintiff's First Set of Interrogatories, Interrogatory No. 6.

monitored her movements, ushered her to the door, demanded her Banner ID card, and directed her to leave the office. (J. App. 8a-9a).

On the basis of these allegations, the complaint sought four distinct forms of relief: (a) compensatory damages for the humiliation, embarrassment and other injuries occasioned by the deliberate age-based harassment, (b) back pay for losses occasioned by the unlawful discrimination in compensation, (c) back pay, front pay, and other equitable relief to redress the unlawful dismissal, and (d) liquidated damages for respondent's willful violation of the ADEA. (J. App. 10a-11a).

C. The After-Acquired Information

The after-acquired information in this case concerns ten pages of routine but confidential company documents. In the fall of 1989, after company officials had begun to threaten petitioner that she might be laid off because the firm was allegedly facing financial difficulties, the comptroller, Imogene Stoneking, directed petitioner to shred copies of documents which revealed the actual financial condition of the firm. (J. App. 52a-53a, 144a-47a). These included a Profit and Loss Statement, dated October 10, 1989, and a ledger indicating the amounts the privately held firm had been paying to its owners. (J.App. 23a-27a). Before destroying the documents, petitioner copied them .[2] All the documents into petitioner's possession through the normal course of business, having been either handed to her or maintained by her in her office. At some subsequent point in time petitioner took the ten copied pages to her

[2]Petitioner also copied from a file maintained in her office three documents related to the status of her former supervisor, Jack Gunter. (J. App. 28a-33a, 148a-150a). In the spring of 1989 petitioner has warned by company officials that they had almost dismissed her when considering whether to dismiss Gunter. (J. App. 50a).

home and showed them to her husband of thirty-six years, but to no one else.

After the commencement of the instant litigation, respondent sought to discover any documents in petitioner's possession that might be relevant to her claims. Counsel for petitioner provided the documents in question to counsel for respondent. Respondent's counsel deposed petitioner regarding her possession of the documents, and then moved for summary judgment.

In support of its motion for summary judgment, respondent submitted similarly worded affidavits from four company officials asserting that they would have dismissed petitioner had they known about the copied documents. The affidavits did not base that assertion on the particular contents of the documents; the affiants did not claim even to know what or how many pages had been copied, but recounted only that they had "been advised" that the materials were "proprietary and confidential documents". (J. App. 35a-45a). The assertions in the affidavits that petitioner would have been fired were based solely on her having "copied and removed" the documents; the affidavits did not rely on the fact that petitioner had shown the materials to her husband. The affidavits acknowledged that petitioner had legitimate access to the documents (J. App. 35a-43a), and did not assert that respondent had in fact been injured by petitioner's action. (See J. App. 71a).

The operative portion of the affidavits was limited to a conclusory assertion that petitioner would have been fired. The affidavits did not purport to describe any company rules regarding the copying or removal of documents, any standards applied by respondent in determining what level of discipline to impose for misconduct, any past disciplinary practices, or the applicable procedures for determining when an employee should be terminated. The circumstances under which the affidavits had been executed were disclosed in subsequent depositions.

The company comptroller, Imogene Stoneking, testified that she knew nothing about the documents issue until an already prepared affidavit was brought to her for her signature. The assertion in Stoneking's affidavit that she "would have terminated" petitioner was written by a third party who could not have discussed the matter with Stoneking herself prior to preparing that affidavit. Stoneking testified that she did not know who had prepared the affidavit. (J. App. 82-83)

In another deposition, respondent's president acknowledged that, when faced with personnel problems like "employees who are not doing their jobs . . . or who had bad attitude problems", it had been the practice to respond only with a "[s]uspension of wage increases" or a "supervisor sitting down with them". (J. App. 70a-71a). Errant employees were warned "that if they don't straighten up, termination will follow." (J.App. 71a). The president conceded that in the previous five years there had not been a single instance in which an employee had been summarily terminated for misconduct. CJ.App. 70a).

Respondent's motion for summary judgment precipitated a vigorous and at times bitter factual dispute about whether petitioner would in fact have been dismissed for copying and removing the documents. The central issue, as respondent acknowledges, was whether petitioner's wrongdoing was "serious enough" to have led to summary dismissal. (R. Br. Op. 3). Petitioner testified that she understood a secretary could be fired only for making public a confidential document. (J. App. 133a, 155a).

The district court understandably did not purport to resolve on summary judgment this factual dispute. Rather than decide whether petitioner would in fact have been dismissed--a factual matter that clearly would have had to be resolved by a jury in this ADEA case--the district judge made two other quite different findings. First, the district court held that respondent *could* reasonably have fired petitioner for removing the documents, asserting that her

actions "provid[e] adequate and just cause for her dismissal as a matter of law." (Pet. App. 17a). Second, apparently believing that petitioner bore the burden of proof on this issue, the trial judge asserted that she had failed to adduce "evidence tending to prove that the Banner would have continued her employment had it learned of her misconduct prior to her termination." (Id.) The court of appeals asserted, inexplicably and incorrectly, that respondent's assertion that it would have dismissed petitioner was "undisputed." (Pet. App. 2a).

SUMMARY OF ARGUMENT

This Court has previously held that an employer that violates the federal rights of an employee cannot avoid liability by proving that it would have fired, or not hired, that employee had it been aware of misconduct on his or her part. *Still v. Norfolk & Western Railway Co.*, 368 U.S. 35 (1961). The National Labor Relations Act and numerous other laws have been similarly construed. Anti-discrimination statutes should not be interpreted in a different manner.

After-acquired information which, if known, would have led to an employee's dismissal cannot render lawful acts that were in fact taken with a discriminatory motive. A legitimate reason can only affect the legality of an adverse employment action if it was a reason that the employer had in mind "at the time of the decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989).

Where a violation of the ADEA has been proven, after-acquired information cannot operate as a complete bar to all relief. The ADEA expressly incorporates the remedial

principles of the Fair Labor Standards Act. Prior to the adoption of the ADEA, the FLSA had been construed not to contain any such bar to relief. *Goldberg v. Bama Manufacturing Corp.*, 302 F. 2d 152 (5th Cir. 1962). The ADEA is presumed to incorporate such pre-existing interpretations of the FLSA. *Lorrilard v. Pons*, 434 U.S. 575 (1978).

If an employer seeks to invoke after-acquired evidence in an ADEA or Title VII case, it must prove both that it would have dismissed the plaintiff on the basis of that information, and that it would have discovered the information in the absence of discrimination. Where the employer meets that burden, the defense will bar reinstatement and front pay, and in a discriminatory discharge case will cut off back pay as of the date on which the information would have been discovered. After-acquired information will not, however, affect compensatory damages for age-based, racial or sexual harassment, awards of liquidated damages or punitive damages, or back pay awards for discrimination in compensation.

ARGUMENT

I. INTRODUCTION

The issue presented by this case is whether an employer that has violated a federal anti-discrimination law can avoid all liability if, *after* the violation has occurred, new information[3] is discovered which the employer claims would

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[3]The National Labor Relations Board, which has dealt repeatedly with this issue, aptly refers to it as "involving a[n] . . . employer's after-acquired knowledge." *Axelson, Inc.*, 285 NLRB 862, 866 n. 11 (1987). Some courts refer to this situation as one involving after-acquired "evidence". Virtually none of these cases, however, involve

have provided a basis for dismissing the employee *before* the violation.[4]

The Sixth Circuit applies a per se rule, holding that after-acquired information of this type provides the employer with an absolute and total defense:

> [A]fter-acquired evidence is *a complete bar* to any recovery by the former employee where the employer can show it would have fired the employee on the basis of the evidence.

(Pet. App. 6a)(Emphasis added)[5]. Under this per se rule, if the after-acquired information is adduced following a judicial finding of a violation, the court must as a matter of law deny all relief. *Milligan-Jensen v. Michigan Technological University*, 975 F. 2d 302 (6th Cir. 1992). If the information is offered prior to trial, the court is precluded as a matter of law from even inquiring whether a violation of federal law has occurred. The same absolute defense is recognized in

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newly found evidence supporting the reason already adduced by the employer for the disputed adverse action. Rather, the claim generally advanced by employers is that they have found information supporting an entirely new reason for dismissing the employee that is distinct from the reason originally proffered for the discharge or other disputed action.

[4]We explain in part V, *infra*, that the issue of whether the employer in this case would in fact have discharged petitioner cannot be resolved at this stage in the proceedings.

[5]See also id. at 4a(such after-acquired information "mandates judgment as a matter of law for an employer charged with discrimination"); *Dotson v. United States Postal Service*, 977 F. 2d 976, 968 (6th Cir. 1992)(such after acquired information "precludes the grant of *any* present relief or remedy")(emphasis added); *Johnson v. Honeywell Information Systems, Inc.*, 955 F. 2d 409, 415 (6th Cir. 1992)(plaintiff "is entitled to no relief, even if she could prove a violation.")

the Tenth Circuit.[6] This per se rule has been aptly described by two commentators as a form of "absolution."[7]

A number of other circuits have declined to apply the per se rule.[8] The Eleventh Circuit has emphatically rejected both the rule and the reasoning of the Sixth and Tenth Circuit cases. *Wallace v. Dunn Construction Co.*, 968 F. 2d 1174 (11th Cir. 1992).[9] Rather than apply any per se rule, *Wallace* treats after-acquired information as one of the factors to be considered in a traditional assessment of what remedy is necessary to place a victim of unlawful

[6]*O'Driscoll v. Hercules, Inc.*, 12 F. 3d 176 (10th Cir. 1994); *Summers v. State Farm Mutual Automobile Insurance Co.*, 864 F. 2d 700 (1988).

[7]R.H. White and R. D. Brussack, "The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation", 35 *Boston Col. L. Rev.* 49, 52 (1993); see also *Wallace v. Dunn Construction Co.*, 968 F. 2d 1174, 1182 (11th Cir. 1992)(per se rule has "the perverse effect of providing a windfall to employers"); *Baab v. AMR Services Corp.*, 811 F. Supp. 1246, 1260 n. 5 (N.D. Ohio, 1993)(applying the Sixth Circuit per se rule while acknowledging, "The troubling aspect of this doctrine is that it can very well lead to penalty free discrimination by an employer.")

[8]In addition to the Eleventh Circuit decision in *Wallace*, see *Lloyd v. Georgia Gulf Corp.*, 961 F. 2d 1190, 1197 (5th Cir. 1992)(employer may not rely on information known only to company official other than the supervisor who had dismissed the plaintiff); *Jimenez-Fuentes v. Torres Gaztambide*, 807 F. 2d 230, 233 (1st Cir. 1985)(after-acquired information relevant only insofar as plaintiff seeks injunction against *future* demotions); *Eastland v. Tennessee Valley Authority*, 704 F. 2d 613, 626 (11th Cir. 1983)(employer cannot defeat hiring discrimination claim of black applicant with evidence that white hired was better qualified, where employer was unaware of those superior qualifications at the time the hiring decision was made.)

[9]A similar analysis is set out in *Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314 (D.N.J. 1993).

discrimination in the position he or she would have occupied "but for" a proven statutory violation. 968 F.2d at 1179-82. *Wallace* concludes that such after-acquired information will limit or preclude some remedies, while not affecting other forms of relief. 968 F. 2d at 1181-83.

Prior to 1989, when after-acquired information was generally accorded only the limited significance reflected in decisions like *Wallace*, there were few reported cases in which employers raised this issue. Since the emergence of the per se rule, however, there has been a dramatic increase in litigation regarding after-acquired information. In recent years there have been more than fifty reported decisions considering employer claims that they would have dismissed employment discrimination plaintiffs had they known of facts actually learned only after the proven or alleged violations of federal law. As a result of this new and total defense, the primary focus of many anti-discrimination cases is no longer on the particular motives that prompted an employer to take a specific disputed action, but on the work histories and lives of the victims of unlawful discrimination.[10]

There are four principal areas in which the conflicting lower court views regarding after-acquired

[10]See, e.g., *O'Driscoll v. Hercules, Inc.*, 12 F. 3d 176 (10th Cir. 1994)(litigation regarding after-acquired information that plaintiff had made inaccurate statements in an application submitted in 1980, six years before the alleged act of discrimination, and ten years before employer raised the issue); *Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314, 326 (D.N.J. 1993)(employer contends it would have denied plaintiff a promotion in 1989 had it known that the plaintiff, while employed as a police officer in *1968*, had mislaid his weapon); *Churchman v. Pinkerton's, Inc.*, 756 F. Supp. 515 (D. Kan. 1991) (discussing in detail after-acquired information that plaintiff had lived at 12 different addresses since graduating from high school, had moved twice to be with her husband when he changed jobs, and while in high school had been fired from a job at a drive-in movie theater.)

information affect differently the outcome of particular cases.

(1) The per se rule bars any relief for claims of harassment on the basis of age, race or gender, including sexual harassment. *Wallace* holds, on the other hand, that remedies for such violations are not ordinarily affected.

(2) The per se rule bars any relief for claims that a plaintiff was paid less than others doing comparable work solely because of his or her age, race or sex. Under *Wallace*, on the other hand, remedies for wage discrimination are not affected.

(3) The per se rule bars, in cases in which they would otherwise be appropriate, awards of punitive damages, or of the liquidated damages[11] required in ADEA cases for "willful" violations. Under *Wallace* these remedies remain available despite any after acquired-information.

(4) The per se rule bars all back pay whatever for a discriminatory discharge. Under *Wallace*, after-acquired information may well affect the amount of a back pay award. Depending on the circumstances, the information may significantly reduce, virtually eliminate, or have no impact on the back pay awarded.

On the other hand, under both lines of cases, albeit for somewhat different reasons, after-acquired information that

[11]The petitioner in this case alleged that she had been harassed and paid less because of her age, and sought such an award of liquidated damages.

would have led an employer to dismiss an employee will preclude reinstatement or front pay.[13]

II. THE SIXTH CIRCUIT'S AFTER-ACQUIRED INFORMATION RULE FOR DISCRIMINATION CASES IS INCONSISTENT WITH ESTABLISHED PRECEDENT CONCERNING OTHER FEDERAL STATUTES AND EMPLOYEE RIGHTS

The circumstance presented by this case is one which has arisen repeatedly under other federal statutes regulating relations between employers and employees. In cases raising this issue outside the context of anti-discrimination laws, it is well established that an employer cannot avoid liability on the basis of after-acquired information.

In *Still v. Norfolk & Western Railway Co.*, 368 U.S. 35 (1961), this Court rejected just such a per se defense to the Federal Employers' Liability Act.[14] The plaintiff in *Still* had sustained back injuries in the course of his employment. The FELA provides railroad employees with a right to compensatory damages for such personal injuries. The employer asserted as a defense the fact that the plaintiff, in order to obtain employment, had made certain false

[13]*Wallace v. Dunn Construction Co.*, 968 F. 2d at 1181-82. A number of decisions explain that reinstatement would simply make no sense since the employer would ordinarily be free to terminate the plaintiff immediately on the basis of the after-acquired information. *Smith v. General Scanning, Inc.*, 876 F. 2d 1315, 1319 n. 2 (7th Cir. 1989); *Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314, 323 (D.N.J. 1993); *cf. Chrysler Motors v. Allied Ind. Workers*, 2 F. 3d 760 (7th Cir. 1993).

[14]368 U.S. at 35 ("The question this case presents is whether a railroad can escape th[e] statutory liability by proving that an employee . . . had obtained his job by making false representations upon which the railroad rightfully relied in hiring him.")

statements to the railroad regarding his physical condition. The employer contended that a worker who held his position solely because the railroad was unaware of the falsity of those statements should not be considered "employed" for the purposes of the FELA. 368 U.S. at 36. This Court rejected that argument, explaining that, save in the most extraordinary of circumstances,

> the terms "employed" and "employee" as used in the Act must, in all cases . . . be interpreted according to their ordinary meaning, and the status of employees who become such through . . . fraud, although possibly subject to termination . . . must be recognized for purposes of suits under the Act.

368 U.S. at 45. The Court quoted with approval a lower court opinion insisting that the law could not mean "that every fraudulent violation of the rules . . would render such employment void, and deny the defrauding employee any rights under the act." 368 U.S. at 38 (quoting the unreported district court opinion affirmed in *Minneapolis St. P. etc. R. Co. v. Borum*, 286 U.S. 447 (1932)). Eight members of the Court rejected the objection of the sole dissenting justice that an award to Still under the FELA would enable him to "profit from his own wrong." 368 U.S. at 50, 51.

The National Labor Relations Board has faced this same situation in enforcing the National Labor Relations Act. In a series of decisions over a period of almost thirty years, the NLRB has repeatedly awarded back pay to employees dismissed in violation of federal labor law, even though recognizing that the employers in question would have dismissed those employees on other grounds had they been aware of unrelated misconduct on the part of those

workers.[15] The Board's practice has been to award back pay from the date of the unlawful dismissal until the date on which the employer actually learned it had lawful grounds for dismissal, reasoning that

> but for [the employee's] union activities, he would have continued in Respondent's employ at least until such time as Respondent acquired information of his . . . misconduct. It is therefore appropriate, in remedying Respondent's unlawfully motivated discharge . . . , to order Respondent to make [the victim] whole from the date of his discharge to the date it acquired this information.

East Island Swiss Products, Inc., 220 NLRB 175, 175 (1975).[16] The Board has also been unwilling to permit

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[15]*John Cuneo, Inc.*, 298 NLRB 856, 856 (1990); *A.A. Superior Ambulance Service*, 292 NLRB 835, 835 n. 7 (1989); *Axelson Inc.*, 285 NLRB 862, 866 (1987); *East Island Swiss Products, Inc.*, 220 NLRB 175, 175-76 (1975); *Bird Trucking and Cartage Co., Inc.*, 167 NLRB 626, 630 (1967); *Big Three Welding Equipment Co.*, 145 NLRB 1685, 1704 (1964), *enforcement granted in part, denied in part, NLRB v. Big Three Welding Equipment Co.*, 359 F. 2d 77, 82-84 (5th Cir. 1966). In *Bird Trucking* and *Big Three Welding Equipment* the Board also ordered reinstatement. The Fifth Circuit in *NLRB v. Big Three Welding Equipment Co.* upheld the back pay award, but declined to reinstate the employee. *See NLRB v. Jacob E. Decker & Sons*, 636 F. 2d 129, 132 n. 3 (5th Cir. 1981). The Board's decision in *Big Three Welding* was issued in February, 1964, five months *before* the enactment of Title VII of the 1964 Civil Rights Act.

[16]*See also John Cuneo, Inc.*, 298 NLRB 856, 856 (1990)("The record shows that the Respondent . . . would have continued to employ [the employee] at least until the Respondent became aware of [the employee's] false statement . . . ."); *A.A. Superior Ambulance Service*, 292 NLRB 835, 835 n. 7 ("The record clearly demonstrates that, had Skinner refrained from engaging in protected activity, he would have remained employed by the Respondent at least until the Respondent became aware of his misconduct.")

circumstances extraneous to the violation of federal law to immunize the employer from any consequences for its illegal action:

> [R]elieving the Respondent of all backpay liability, including for the period when the Respondent had no knowledge of [the employee's misconduct] and had no lawful reason to fire him, would provide an undue windfall for the Respondent.

John Cuneo, Inc., 298 NLRB 856, 856 (1990).[17]

In *ABF Freight System, Inc. v. NLRB*, 510 U.S. ----, 127 L.Ed. 2d 152 (1994), this Court upheld the NLRB's closely related practice of awarding the usual remedies of back pay and reinstatement to the victims of unfair labor practices, even where those workers had made false statements to the Board itself. This Court refused to adopt for such cases a "categorical exception" to the usual forms of relief. 127 L. Ed. 2d at 160. The Court properly recognized that such a per se rule might well "force the Board to divert its attention from its primary mission and devote unnecessary time and energy to resolving collateral disputes . . . ." Id. In declining to convert the National Labor Relations Act into a scheme for policing employee misconduct, the Court stressed that "other civil and criminal remedies" remained to deal with such problems. Id. (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. ---, 127 L. Ed. 2d 152 (1993)).[18]

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[17] *Axelson, Inc.*, 285 NLRB 862, 866 n. 11 (1987)("We would be granting an undue windfall if we . . . relieved the Respondent of all backpay liability . . . .")

[18] In *A.A. Superior Ambulance Service*, 292 NLRB 835, 835 n. 7 (1989), the Board referred evidence regarding an errant employee "to the appropriate licensing and drug enforcement agencies."

The Wage and Hour Division of the Department of Labor has long taken a similar position with regard to violations of employee rights under the Fair Labor Standards Act. In *Goldberg v. Bama Manufacturing Corp.*, 302 F. 2d 152 (5th Cir. 1962), the aggrieved worker had been dismissed by her employer for reporting to the Department of Labor violations of the federal minimum wage laws. The Wage and Hour Division brought suit in the name of the then Secretary of Labor, seeking to enforce this Court's decision in *Mitchell v. Robert De Mario Jewelry*, 361 U.S. 288 (1960), that victims of such retaliatory dismissal were entitled to monetary redress. The district court denied all relief because the employer had learned after the worker's unlawful dismissal of several other reasons that would certainly have justified her discharge. 302 F. 2d at 154. The Department of Labor successfully appealed to the Fifth Circuit, which held, in language similar to that in *Wallace*, that the law required that an illegally dismissed employee "should be restored, as nearly as possible, to the same situation he would have occupied if he had not been discharged." 302 F. 2d at 156. Even though the circumstances of that case rendered reinstatement inappropriate, the court of appeals insisted that it would be inconsistent with "the purposes of the Fair Labor Standards Act" to "allo[w] the employer to get away scot free", 302 F. 2d at 156, and directed that the unlawfully discharged worker be awarded both back pay and damages. *Id.*

The Benefit Review Board of the Department of Labor has taken the same position with regard to the Longshoremen's and Harbor Worker's Compensation Act, which provides the equivalent of workers' compensation to certain employees. In *Newport News Shipbuilding and Dry Dock Co. v. Hall*, 674 F. 2d 248 (4th Cir. 1982), the employer insisted that it was immunized from any award under the Act by the fact that the injured worker in question had obtained his job by misrepresenting his medical condition. The Administrative Law Judge, however, found

"no provision in the Act relieving an employer of liability in such circumstances", and the Labor Department Benefit Review Board awarded benefits. 674 F. 2d at 249. On the employer's petition for review, the Fourth Circuit sustained the decision of the Board. The court of appeals noted that Congress had written into the statute a number of express limitations and defenses, and refused "to expand the existing exceptions." 674 F. 2d at 251. The court of appeals declined to entertain the employer's argument that any award in such a case would be "inequitable", explaining that "[t]hese are precisely the types of policy arguments that must be presented to and considered by Congress." 674 F. 2d at 252. *Newport News* expressly relied on this Court's decision in *Still*. 674 F. 2d at 254.

The lower courts have also relied on *Still* in refusing to permit shipowner-employers to avoid liability under the Jones Act. In *Gypsum Carrier, Inc. v. Handelsman*, 307 F. 2d 525 (9th Cir. 1962), the plaintiff had fraudulently concealed a variety of illnesses and injuries when he applied for work. The Ninth Circuit nonetheless rejected the employer's contention that such misconduct on the part of the employee should operate as "a general release of the shipowner's obligation" to provide maintenance and cure in the event of injury. 307 F. 2d at 531. Citing this Court's opinion in *Still*, the court of appeals declined to adopt "any general rule which would make fraud at the inception of the" employment relationship a bar to redress for later injury. 307 F. 2d at 530. It warned that such a rule would "stir contentions, cause delays, and invite litigations." 307 F. 2d at 531. The Ninth Circuit reaffirmed that application of *Still* in *Omar v. Sea-Land Service, Inc.*, 813 F. 2d 986 (9th Cir. 1987). The court emphasized that a variety of civil and even criminal proceedings were available to deal with misconduct by seamen, including obtaining a position through fraud.

813 F. 2d at 990. Again relying on *Still*, 813 F. 2d at 989, the Ninth Circuit admonished, "The duties of maritime employers are owed not to perfect contracts, but to imperfect sailors." 813 F. 2d at 990. See also *Compton v. Luckenbach Overseas Corp.*, 425 F. 2d 1130 (2d Cir.), *cert. denied* 400 U.S. 916 (1970); *Spinks v. United States Lines Co.*, 223 F. Supp. 371, 371-72 (S.D.N.Y. 1963)(citing *Still*).

None of the lower court opinions applying the Sixth Circuit's per se rule in employment discrimination cases have questioned the correctness of the contrary interpretation of non-civil rights statutes. The Sixth Circuit below did not discuss this Court's opinion in *Still*, and did not dispute the precedents set out above. If the petitioner had sued respondent under any of these other laws, the Sixth Circuit would presumably have permitted her to try her case on the merits.

If, however, *Still*, its progeny, and the federal agency interpretations of these non-civil rights laws are correct, it is difficult to see how the contrary rule can be correct in employment discrimination cases. The reasoning of these decisions interpreting non-civil rights statutes is applicable to anti-discrimination laws. The per se rule applied by the Sixth and Tenth Circuits is remarkably similar to the per se rule rejected by this Court in *Still* and *ABF Freight System*. Respondent in this case has obtained precisely the "undue windfall" which the NLRB rejected as intolerable in *John Cuneo, Inc.*, and has gotten away "scot free", as the Wage and Hour Division cautioned would occur were its interpretation of the law not accepted in *Goldberg*. Precisely as this Court warned in *ABF Freight Systems*, the lower courts in employment discrimination cases have often been diverted from their primary mission of enforcing federal law and have become embroiled in a large number of essentially collateral disputes about alleged employee misconduct.

None of this would matter, of course, if there were a clear and compelling reason to accord to plaintiffs invoking

the ADEA or Title VII a lesser set of remedies, and thus a lesser degree of enforcement, than is already available under the Federal Employers' Liability Act, the National Labor Relations Act, the Fair Labor Standards Act, the Longshoremen's and Harbor Worker's Compensation Act or the Jones Act. But no reason for such a distinction is readily imaginable. The public policies underlying the nation's civil rights laws are matters of "the highest priority." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976). Congress enacted the ADEA after it found that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice", and that the problem of discrimination against older workers was indeed "grave". 29 U.S.C. §621(a). The principles of the nation's anti-discrimination laws have their roots in the constitutional values embodied in the Fourteenth Amendment. Having concluded that statutes such as the ADEA and Title VII were indeed vital to the interest and conscience of the nation, Congress could not have intended to tacitly engraft into those landmark enactments an exception which did not exist in other then existing federal statutes regulating employer-employee relations.

A number of these non-civil rights cases, including *ABF Freight System*, turned in part on the fact that the interpretation of the statute involved was advanced by the agency charged by Congress with primary responsibility for implementing that law. But that is true here as well. The EEOC, which is responsible for the enforcement of the ADEA and Title VII, has expressly rejected the per se rule applied by the Sixth Circuit in this case. The Commission has concluded that the proper role of after-acquired information is only to limit in certain respects, not to bar entirely, relief for intentional discrimination:

> [I]f the employer produces proof of a justification discovered after-the-fact that would have induced it to take the same action, the employer will be shielded from an order requiring it to reinstate the complainant or to pay the portion of back pay accruing *after* the date that the legitimate basis for the adverse action was discovered, and the portion of compensatory damages . . . that would cover losses arising *after* that date . . . . [I]f the employer's *sole* motivation was discriminatory and it acted with "malice or with reckless indifference" to the victim's rights, proof of an after-the-fact justification would not shield an employer from an order requiring it to pay punitive damages.

Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory, EEOC Compl. Man. (BNA) 405:6926-27 (first two emphases added, third emphasis in original). Respondents candidly acknowledge that such EEOC "policy guidance statements are relevant" and "instructive here". (Br. in Opp., 21, 22 n. 28).

III. AFTER-ACQUIRED INFORMATION THAT MIGHT WARRANT DISMISSAL OF AN EMPLOYEE DOES NOT PRECLUDE A FINDING OF LIABILITY UNDER THE ADEA

The Sixth Circuit's per se rule could be sustained if the effect of after-acquired information were somehow to render lawful acts that otherwise would have violated the ADEA. Clearly, however, such after-acquired information cannot affect the legality vel non of events which occurred at a point in time when the employer, by definition, had not yet acquired that knowledge.

The ADEA provides that it is "unlawful for an employer . . to discharge any individual . . . because of such individual's age". 29 U.S.C. §623(1). The statutory language on its face recognizes no exception to this straightforward prohibition; it forbids an age-based dismissal of "any" individual, not "any individual except one who has copied

documents without authorization" or "any individual other than one who has made a false statement on a job application." Far from making such narrow distinctions, the ADEA "broadly prohibits" discrimination on the basis of age. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985).

If the existence of an as yet unknown legitimate basis for dismissing an individual were sufficient by itself to render discrimination lawful, imperfect employees would fall completely outside the protections of the ADEA or Title VII. One lower court judge has indeed suggested that statutes such as the ADEA simply do not apply to such dismissable employees[19]. Pursuant to this view, discrimination against such workers is legal under the ADEA, and the after acquisition of relevant information simply reveals that the workers never enjoyed any legal protection in the first place.[20] But Congress in both the ADEA[21] and Title VII[22] spelled out quite specifically those

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[19]*Wallace v. Dunn Construction Co.*, 968 F. 2d 1174, 1187-89 (Godbold, J., dissenting.)

[20]In at least one instance a court applying the per se rule has invoked it to dismiss employment discrimination claims by an individual who was still employed by the defendant. In such a situation the employer would literally be free to discriminate against the employee with complete impunity. *Russell v. Microdyne Corp.*, 830 F.Supp. 305, 308 (E.D.Va. 1993)("regardless of the reasons for Russell's continued employment by Microdyne, . . . there is no principled reason for applying the after-acquired evidence doctrine differently for a current employee than for a former employee.")(claim of sexual harassment).

[21]The ADEA does not apply to individuals employed by employers with fewer than twenty employees, 29 U.S.C. §630(b), to state employees who are elected or hold certain policy-making positions, 29 U.S.C. §630(f), or to persons over the age of 70. 29 U.S.C. §631.

employees to whom it wished to deny coverage. None of those express statutory exceptions is applicable to petitioner. The courts are not free to create additional exceptions to the otherwise comprehensive protections of the law.[23] Petitioner is indeed covered by the protections of the ADEA, and the discrimination alleged here was illegal regardless of what after-acquired information there may be.

In a disparate treatment case, the legality of an adverse employment action turns on the motive of the employer at the time the actions occurred.[24] This Court has recognized that the contemporaneous existence of a legitimate motive may render lawful an action that was also taken in part for an unlawful reason. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Mt. Healthy City School Bd. v. Doyle*, 429 U.S. 274 (1977). But these cases make clear that to effect the legality vel non of an action, that legitimate reason must be one which the employer actually had in mind at the "particular time" when the disputed action took place. *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 716 (1983).

> The critical inquiry, the one commanded by the [prohibition against intentional discrimination], is whether [age] was a factor in the employment

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[22]As originally enacted, Title VII did not apply to individuals employed by firms with fewer than 25 (now 15) workers, the United States, a state or political subdivision, an Indian Tribe, or certain bona fide private organizations, or to certain employees of religious organizations.

[23]*Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314, 323 (D.N.J. 1993)("There is nothing in the statute itself to support a requirement that the job had been acquired honestly.")

[24]*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)(legality of the action turns on "the true reason for the emloyment decision ").

> decision *at the moment it was made*. . . . An employer may not, in other words, prevail . . . by offering a legitimate and sufficient reason for its decision if that reason did not motivate it *at the time of the decision*.

Price Waterhouse v. Hopkins, 490 U.S. at 240, 252 (first emphasis in original; second emphasis added). The employer can avoid a finding of liability only by proving "the same decision would have been reached" even in the absence of any unlawful motive. *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274, 285 (1977).[25]

In light of *Price Waterhouse* and *Mt. Healthy*, the defect of the Sixth Circuit's per se rule is readily apparent. After-acquired information cannot overcome the legal consequences of the existence of a discriminatory motive precisely because that information is "after-acquired". As the Eleventh Circuit has correctly pointed out, the fatal flaw in the per se rule is that it "ignore[s] the time lapse between the unlawful act and the discovery of a legitimate motive." *Wallace v. Dunn*, 968 F. 2d at 1181.[26] *Mt. Healthy's* requirement that the employer prove that it would have made the "same decision" on the proffered legitimate basis

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[25]*Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 n. 10 ("employment decision the same"), 242 ("same decision"), 250("same decision"), 258 ("same decision")(1989); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401("would have acted in the same manner")(1983); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 416 ("same decision")(1979); *Village of Arlington Heights v. MHDC*, 429 U.S. 252, 270 n. 21 ("same decision")(1977).

[26]In rejecting the per se rule, the EEOC reasoned, "If an employer terminates an individual on the basis of a discriminatory motive, but discovers afterwards a legitimate basis for the termination, then the legitimate reason was not a motive for the action." *Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory*, EEOC Compl. Man. (BNA) 405:6915, 405:6926.

surely means that the employer must show that both the substance and the date of its decision would have been the identical. An employer could not defend the race-based dismissal of a worker in 1980 by asserting that it would in any event have dismissed that worker in 1990 when it closed the plant at which he or she worked. A decision to fire an employee in October 1990, the date on which petitioner was actually dismissed, is simply not the same thing as a decision to fire that employee in December 1991, the date on which respondent first invoked the after-acquired information at issue in this case.[27]

The per se rule is premised on the view that the critical inquiry under *Mt. Healthy* is not what the employer would have done "but for" the discriminatory motive, but what the employer would have done "had all the facts been known."[28] Courts applying the per se rule thus hold that it is irrelevant *why* the employer was unaware at the time of the adverse action of the later acquired information.[29] This standard would lead to nonsensical results. On this interpretation of *Mt. Healthy*, an employer could avoid liability in a hiring case by showing that, at the time it rejected a qualified black applicant on account of race, there was a better qualified white available for the position, even though the white had never applied for the job and the

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[27]Petitioner also alleges that respondent harassed her and paid her less because of her age. Respondent does not of course contend that petitioner's actions regarding the disputed documents would have prompted the employer to either harass or underpay her.

[28]*Wallace v. Dunn Construction Co.*, 968 F. 2d 1174, 1188 (11th Cir. 1992)(Godbold, J., dissenting).

[29]*Van Deursen v. United States Tobacco Sales Co.*, 839 F. Supp. 760, 764 (D.Colo. 1993); *Agbor v. Mountain Fuel Supply Co.*, 810 F. Supp. 1247, 1252-53 (D. Utah 1993); *Washington v. Lake County, Illinois*, 762 F. Supp. 199, 202 (N.D.Ill. 1991); *George v. Meyers*, 1992 WL 97777, *1 (D. Kan. 1992).

employer only learned of his or her existence long after the black applicant had been rejected. The Eleventh Circuit, which does not follow the per se rule, has correctly rejected that defense.[30] In changing economic times, employers often make the mistake of maintaining a large workforce when, had all the economic facts been known, they would have laid off workers. Yet it is inconceivable that an employer could avoid liability under the ADEA or Title VII by proving that it would have fired the plaintiff before the statutory violation occurred, where the basis of that demonstration was after-acquired information regarding the previously secret minutes of the Federal Reserve Board Open Markets Committee, or about a competitor's new product.

If, under the per se rule, after-acquired information is deemed to relate back to the point in time when a disputed employment action occurred, surely the same principle would have to apply where it operates to the advantage of the aggrieved employee. Yet such a retroactive imputation of new information would have a revolutionary impact. Under current law an employer can at times invoke a lack of information as part of its defense in an employment discrimination action. Thus an employer which hired a less qualified man over a better qualified woman is not liable under Title VII if when it made that decision it merely misunderstood the facts.[31] Similarly, an employer is not liable for liquidated damages under the ADEA if at the time of the violation it believed in good faith that age was a bona fide occupational qualification for the position at issue. If, however, after-acquired information were generally

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[30]*Eastland v. Tennessee Valley Authority*, 704 F. 2d 613, 626 (11th Cir. 1983); *EEOC v. Alton Packaging*, 901 F. 2d 901, 925 (11th Cir. 1990).

[31]*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

deemed to relate back to the date of the alleged violation, it would render illegal otherwise lawful conduct, and render willful some violations which at the time they occurred were non-willful.

The lower courts adopting the per se rule appear to have done so out of a concern about the problem of employee misconduct and resume fraud. Congress has wisely chosen, however, not to require or authorize the federal courts to engage in a general policing of the American workplace. Rather, Congress has carefully delineated those employment problems which are to be addressed in federal courts, leaving all other issues to state courts or less formal methods of resolution. The ADEA and Title VII deal with two problems Congress concluded should be dealt with in federal court. This Court observed in *St. Mary's Honor Center v. Hicks*, 509 U.S.---, 125 L. Ed. 2d at 407 (1993), that "Title VII is not a cause of action for perjury." 125 L. Ed. 2d at 425. Neither is the ADEA a Truth-In-Resumes Act, or a general code of employee conduct.

Hicks held that federal courts in Title VII or ADEA cases are to restrict themselves to determining whether acts of intentional discrimination had occurred. If an employer were to proffer false testimony, *Hicks* held, that would not warrant entry in favor of the plaintiff of a "judgment-for-lying". 125 L. Ed. 2d at 425. Under the per se rule, however, "judgments-for-lying" are regularly entered in favor of defendants, where, for example, a plaintiff had lied on a resume. That is precisely the judgement which the Sixth Circuit directed be entered in *Milligan-Jensen v. Michigan Technological University*, 975 F. 2d 302 (6th Cir. 1992). Similarly, this Court insisted in *Hicks* that judgment for the plaintiff could not be based on the fact that the facility director, John Powell, had engaged in a vendetta against Melvin Hicks for personal rather than racial reasons. But under the per se rule, the defendant in *Hicks* would have been entitled to judgment, despite acts otherwise unlawful

under Title VII, if Mr. Hicks had engaged in such a personal vendetta against Powell. We suggest that neither form of misconduct should be relevant to the question of liability under federal anti-discrimination laws.

The per se rule commits the federal courts to a task even further removed from the enforcement of employment discrimination law than merely punishing falsehoods. The district court in the instant case held that federal employment discrimination claims are to be dismissed for "severe" "misconduct", although not for "minor or trivial" infractions. (Pet. App. 16a, 17a).[32] The implementation of such a distinction would require the federal courts to construct a federal common law of employee conduct, selecting from the limitless variety of activities engaged in by workers those actions to be labeled misconduct, and then deciding which of these were to be rated "severe" and which "minor." Federal judges, however, have neither the capacity nor the congressional mandate to establish such an employee rating system. This Court in *Still* rejected a per se rule barring FELA claims by workers who had engaged in serious fraud precisely because it found that lower courts which had tried to apply such a rule had "been forced to struggle with the baffling problem of how much and what kinds of fraud are sufficiently abhorrent." 368 U.S. at 42.[33]

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[32] See also R. Br. Opp. 10, 11 ("the doctrine" applies to "serious misconduct" but not "minor infractions").

[33] Respondent urges this Court to decide that a secretary who copies ten pages of documents and takes them home, showing them to no one but her husband, is guilty of "severe" rather than "minor" misconduct (R.Br.Op. 10-11). That is simply the wrong question. The threshold issue in an after-acquired information case is not a question of law for the court regarding whether an infraction is to be rated as "severe", but a question of fact--to be decided in an ADEA case by the jury--as to whether the particular employer would actually have dismissed the plaintiff on that basis.

To the extent that employers may have been wronged by present or former employees, "we have other civil and criminal remedies for that." *St. Mary's Honor Center v. Hicks*, 125 L. Ed. 2d at 407; see *ABF Freight System v. NLRB*, 510 U.S. --, 127 L Ed. 2d 152, 160 (1994). If the respondent has been injured by petitioner, it can presumably bring an appropriate action in state court. Such state court proceedings are a far more appropriate form of redress for aggrieved employers, since state courts can award the precise level of relief warranted by the circumstances. The only form of redress for employee misconduct available from a federal court entertaining an employment discrimination action is dismissal of that federal claim, the value of which may greatly exceed, or be far less than, whatever harm may have been suffered by the employer.[34] In some instances criminal or other forms of disciplinary proceedings might be appropriate. In several after-acquired information cases the plaintiffs had in fact already been sanctioned in that manner[35]. No federal purpose is served by imposing the additional sanction of dismissal of pending employment discrimination claims.

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[34]The court of appeals below expressed concern about a hypothetical case in which an employment discrimination victim stole "money from her employer for support of herself." Pet. App. 9a n.8. In *Johnson v. Honeywell Information Systems, Inc.*, 955 F. 2d 409, 415 (6th Cir. 1992), the Sixth Circuit hypothesized a situation in which the civil rights plaintiff was a non-physician who had been working under false pretenses as a company doctor. The important thing about these somewhat far fetched hypotheticals is that if they ever in fact occurred, the employees could and almost certainly would be subject to criminal prosecution.

[35]Such sanctions had in fact been imposed on the plaintiffs in *Omar v. Sea-Land Service, Inc.*, 813 F. 2d 986, 988 (9th Cir. 1987)(seaman's papers revoked by the Coast Guard); *Moyland v. Maries County*, 792 F. 2d 746, 748 (8th Cir. 1986)(plaintiff charged with a misdemeanor).

This Court admonished in *Hicks* that awarding judgment to an employment discrimination plaintiff because a defense witness lied would be a "strangely selective" sanction that was far from "fair and even-handed." *St. Mary's Honor Center v. Hicks*, 125 L. Ed. 2d at 425. The same is true of the per se rule applied below. An employer is free to perpetrate on an employee violations of tort, contract, or criminal law principles without any consequence under the ADEA or Title VII, so long as no invidious motive is involved, while the employee's rights under those laws may be forfeited for similar infractions. Even where the employer's misconduct is related to an intentionally discriminatory scheme, the effect of the per se rule is necessarily to punish the employee and exonerate the employer.[36] In the sometimes rough and tumble world of employer-employee relations, the effect of the per se rule is to "license [the employer] to fight freestyle, while requiring the [employee] to follow Marquis of Queensbury Rules." *R.A.V. v. St.Paul*, 505 U.S. ---, 120 L. Ed. 2d 305, 323.

IV. AFTER-ACQUIRED INFORMATION THAT MIGHT WARRANT DISMISSAL OF AN EMPLOYEE MAY LIMIT, BUT IS NOT A COMPLETE BAR TO, RELIEF UNDER THE ADEA

The decision of the Sixth Circuit below asserts, albeit with little explanation, that after-acquired information which

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[36]See *Bonger v. American Water Works*, 789 F. Supp. 1102, 1106-07 n.5 (D. Colo. 1992)(in dismissing Title VII claim because plaintiff had made false statement in her resume, court deems irrelevant fact that company official made false statement about his own work experience at deposition). In the not uncommon situation in which an employer has a written policy against discrimination, the plaintiff's allegation of discrimination is necessarily also a claim that one or more supervisory officials violated the employer's own rules.

would have led to a plaintiff's dismissal "is a complete bar to any recovery." (Pet. App. 6a).

It is particularly clear, however, that after-acquired information should not be a bar to recovery in a claim under the ADEA. Section 4(b) of the ADEA, 29 U.S.C. §626(b), states that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies and procedures provided in sections 211(b), 216 . . . and 217 of this title." The referenced sections are the enforcement provisions of the Fair Labor Standards Act. 29 U.S.C. §201, et seq. As we set out *supra*, the Fair Labor Standards Act was authoritatively construed in 1962--five years prior to the 1967 enactment of the ADEA--not to contain any per se bar based on after-acquired information, an interpretation of the FLSA sought and supported by the Wage and Hour Division of the Department of Labor. *Goldberg v. Bama Manufacturing Corp.*, 302 F. 2d 152 (5th Cir. 1962).

Read in conjunction with the language of section 4(b), *Goldberg* is dispositive of the after-acquired information issue under the ADEA. This Court explained in *Lorrilard v. Pons*, 434 U.S. 575 (1978):

> [W]e find a significant indication of Congress' intent in its directive that the ADEA be enforced in accordance with the "powers, remedies, and procedures" of the FLSA . . . . Congress is presumed to be aware of an administrative or judicial interpretation of a statute . . . . [W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.
>
> That presumption is particularly appropriate here since, in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA

> provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.

434 U.S. at 581 (Emphasis omitted). Only last year this Court reiterated the decisive importance of pre-1967 interpretations of the FLSA in construing the ADEA, *Hazen Paper Co. v. Biggins*, 507 U.S.---, 123 L. Ed. 2d 338, 349 (1993), as it had in *Trans World Airlines, Inc., v Thurston*, 469 U.S. 111, 126 (1985). In this context the decision in *Goldberg* is sufficient to compel rejection of the Sixth Circuit's interpretation of the ADEA.

Even in the absence of *Goldberg*, the well established remedial principles applicable to any employment discrimination claim would require rejection of the Sixth Circuit's per se rule. The remedial issues in all such cases are guided by this Court's seminal decision in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Explaining the remedial provisions of Title VII, the Court laid down a standard equally applicable to all civil rights statutes:

> [T]hat Act is intended to make the victims of unlawful discrimination whole, and that . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

422 U.S. at 421. The Court has reiterated that standard on a number of occasions. *United States v. Burke*, 504 U.S. ---, 119 L. Ed. 2d 34, 46 (1992)(quoting *Albemarle*); *Ford Motor Co.v. EEOC*, 458 U.S. 219, 230 (1982)(quoting *Albemarle*); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (quoting *Albemarle*), 769 (courts are to "restor[e] the economic status quo that would have obtained but for the company's wrongful [act]")(1976).

Under the per se rule applied by the Sixth Circuit, however, the victims of discrimination in an after-acquired information case are *never* placed in the "position where they would have been were it not for the unlawful discrimination." The relief accorded under the per se rule is not limited or inadequate, it is completely non-existent. Far from being restored to the position they would have been in had the violation of the ADEA not occurred, under the Sixth Circuit rule the victims of the unlawful discrimination are left to suffer all the injuries inflicted by a violation of federal law, as if the ADEA itself had never been enacted. The Sixth Circuit decision in the instant case denies petitioner four distinct types of relief necessary to restore her to the circumstances that would have existed but for the alleged discriminatory acts.

First, under the Sixth Circuit rule petitioner is denied damages for intentional harassment on the basis of age, in this case harassment inflicted on her for the purpose of coercing her resignation. Decisions applying the Sixth Circuit's per se rule have repeatedly dismissed without relief claims of harassment on the basis of race or gender, inciuding sexual harassment.[37] This Court noted in *Harris*

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[37]*Russell v. Microdyne Corp.*, 830 F. Supp. 305 (E.D.Va. 1993)(dismissing sexual harassment claim); *Baab v. AMR Services Corp.*, 811 F. Supp. 1246 (N.D.Ohio 1993)(dismissing sexual harassment claim); *Washington v. Lake County, Illinois*, 762 F. Supp. 199 (N.D.Ill. 1991)(dismissing racial harassment claim); *Churchman v. Pinkerton's Inc.*, 756 F. Supp. 515 (D. Kan. 1991)(dismissing sexual harassment claim); *Mathis v. Boeing Military Airplane Co.*, 719 F. Supp. 991 (D. Kan. 1989)(dismissing claims of racial and sexual harassment); *Benson v. Quanex Corp.*, 58 FEP Cas. 743 (E.D.Mich. 1992)(dismissing racial harassment claim).

Other decisions have refused to allow employers to invoke after-acquired information to block relief in sexual or other harassment cases. *Wallace v. Dunn Construction Co.*, 968 F. 2d 1174, 1182 (11th Cir. 1992)(sexual harassment); *Bazzi v. Western and Southern Life Insurance Co.*, 808 F. Supp. 1306 (E.D.Mich.

v. Forklift Systems, Inc., 510 U.S. __, 126 L. Ed. 2d 295, 302 (1993), the wide variety of injuries that can be occasioned by such harassment. Unlike the ADEA, which from the beginning authorized the granting of "legal . . . relief", 29 U.S.C. §626(b), Title VII as originally enacted provided only for equitable remedies. When Title VII was amended to authorize damage awards, Congress was particularly concerned about the need for such awards in harassment cases, noting that harassment could cause "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. §1981a(b)(3). In especially egregious cases, invidious harassment can "destroy completely the emotional and psychological stability of . . . workers." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986).

None of these are injuries that would have been sustained had respondent merely dismissed petitioner for the alleged misconduct, whether that dismissal had occurred at the time of the actual discharge, October 1989, or when the after-acquired information was first invoked, December 1990. Respondent contends only that it would have discharged petitioner on the basis of that information; respondent does not assert that, in some malicious fit of pique, it would have subjected petitioner to a protracted period of harassment before firing her. Thus the after-acquired evidence on which respondent relies does not affect the undeniable fact that only an award of damages can restore petitioner to the position she would have been in had the harassment not occurred.

Second, under the decision below petitioner is denied back pay for the period when respondent paid her a lesser

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1992)(national origin harassment).

wage on account of her age.[38] This claim relates to wages petitioner earned during a period of more than a year prior to her dismissal. Regardless of whether respondent might have been justified in dismissing petitioner at some point in this period, respondent did not do so. Petitioner was employed by respondent throughout those months, and respondent does not assert that the after-acquired evidence gave it any right to refuse to pay her for work actually performed. The ADEA provides that the amount of compensation which petitioner would otherwise have been paid for her work could not be reduced because of her age. If, as petitioner contends, she was paid less in 1989-90 because of her age, she was entitled to that unlawfully withheld wage when she earned it, and she remained entitled to it on the day she was actually fired, even if that dismissal had been for lawful reasons. The after-acquired information in this case does not affect the fact that only an award of back pay will restore petitioner to the position she would have occupied had the wage discrimination not occurred.

Third, under the Sixth Circuit decision petitioner is improperly denied any back pay whatever for her unlawful discharge. We acknowledge that, under *Albemarle*, the after-acquired evidence may be relevant to the *amount* of back pay for such an unlawful dismissal. Back pay for any discriminatory discharge necessarily terminates at that point

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[38]Petitioner contends she was denied equal pay in two ways, by being denied a raise which would have been awarded but for her age, and by being denied on that basis compensatory time to which she otherwise would have been entitled.

In addition to the instant case, the per se rule was used to bar wage discrimination claims in *Miller v. Beneficial Management Corp.*, 844 F. Supp. 990 (D.N.J. 1993) and *Rich v. Westland Printers*, 62 FEP Cas. 379 (D. Md. 1993). Other decisions have concluded that after-acquired information should be treated as legally irrelevant to such equal pay claims. See, e.g., *Boyd v. Rubbermaid Commercial Products*, 62 FEP Cas. 1228 (W.D.Va. 1992).

in time at which the victim would have lost his or her job for non-discriminatory reasons. For example, having been dismissed in October, 1990, petitioner's right to back pay would have ended on June 30, 1991, if on that date respondent had closed its doors and fired its entire staff; in such a situation an award of back pay from October 1990 through June 1991 would be sufficient to restore petitioner to the position she would have occupied but for the discriminatory dismissal. This application of the *Albemarle* "but for" rule does not, however, mean that the mere existence of after-acquired information automatically wipes out all back pay claims in unlawful discharge cases. "But for" the discriminatory discharge, an employee would have remained on the job from the date of the unlawful dismissal until the date on which the employer learned the relevant information and dismissed the plaintiff.[39] Thus, as the Eleventh Circuit urged in *Wallace v. Dunn Construction Co.*, the back pay period in a wrongful discharge case only cuts off at the point in time at which, but for the discrimination, the employer would have discovered the relevant information and would have dismissed the employee. 968 F. 2d at 1182.

Of course, an employer could attempt to show that it would have discovered the critical information only a matter of days after a plaintiff was unlawfully dismissed, thus reducing its back pay exposure to a nominal amount.[40] Although, in the instant case, respondent only learned

[39]"If [the plaintiff] is not compensated for the losses suffered between the time he was illegally fired and the time he would have been fired on account of the discovery of relevant facts, he is not in the same position he would have been in but for a wrong committed against him, and the purpose of the protective legislation is entirely lost." *Welch v. Liberty Machine Works, Inc.*, 1994 WL 169682 at *4 (8th Cir. 1994)(Arnold, J., dissenting).

[40]*Proulx v. Citibank, N.A.*, 681 F. Supp. 199, 203 (S.D.N.Y. 1988).

about the disputed documents in December, 1991, it might conceivably be able to demonstrate that the problem would have come to light much sooner had petitioner not been dismissed in October, 1990. But, as is true in framing any remedy under *Albemarle*, the dispositive question is when the information would have come to light "but for" the unlawful discrimination.

In some circumstances even reducing a back pay award on the basis of after-acquired evidence would be inconsistent with the principles of *Albemarle*. As the circumstances of this case illustrate, actions taken by an employer in violation of federal anti-discrimination law may understandably prompt a response by the intended victim of that statutory violation, including steps to protect his or her legal rights.[41] Where an employer in turn seizes on that response as providing a justification for dismissal, the entire train of events is one that would not have occurred "but for" the original statutory violation. In at least some circumstances it would be inappropriate to reduce the remedy accorded to a discrimination victim merely because of his or her response to that violation.

The courts below mistakenly thought it irrelevant as a matter of law whether the copying of the documents at issue in this case was a response to respondent's violation of the ADEA. (Pet. App. 8a, 9a, 17a). The court of appeals believed that it would be appropriate to consider after-acquired information that an employee had embezzled large sums of money in response to a statutory violation. (Pet. App. 9a n. 8) On the other hand, an employer could not conceivably dismiss an employee, on the basis of after-

[41]*O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466, 1467 (D. Ariz. 1992)(plaintiff copied document showing alteration of his ranking to justify discriminatory layoff); *Boyd v. Rubbermaid Commercial Products, Inc.*, 62 FEP Cas. 1228 (W.D.Va. 1992)(plaintiff copied document revealing salary discrimination).

acquired evidence or otherwise, because, in response to a sexual assault by her supervisor, she had denounced him in coarse language.[42] Where the instant case falls between those is one of the issues that must be addressed on remand.

Petitioner also sought in her complaint an award of liquidated damages for an allegedly willful violation of the ADEA. Under the ADEA a plaintiff is entitled to liquidated damages equal to the amount of any damages awarded for such a violation shown to be willful. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). Because such liquidated damages are not intended to make a plaintiff whole for harm occasioned by a violation of the ADEA, the *Albemarle* analysis set out above is not the appropriate one. Nonetheless, after-acquired evidence cannot provide a basis for denying liquidated damages where they are otherwise appropriate under the ADEA.

The plain language of the ADEA and FLSA unequivocally directs the courts to make such an award if two circumstances are met: (1) a plaintiff has been awarded damages under the ADEA and (2) the underlying violation was a "willful" one. Section 216(b) of the FLSA, which the ADEA expressly incorporates by reference, states unequivocally, "Any employer who violates [the law] *shall* be liable to the employee or employees affected in the amount of their unpaid minimum wages . . . and in an additional equal amount as liquidated damages." 29 U.S.C. §216(b)(Emphasis added) Although a portion of the Portal-to-Portal Pay Act accords courts some latitude to deny liquidated damages in FLSA cases, that provision of the Portal-to-Portal Pay Act is specifically inapplicable to ADEA cases. See *Lorillard v. Pons*, 434 U.S. 575, 581 n. 8 (1978). The legislative history of the ADEA indicates that Congress included the liquidated damages provision in order to punish

[42]*EEOC v. FLC Brothers Rebel, Inc.*, 663 F. Supp. 864, 867 (W.D.Va. 1987).

willful violators of the law, and to operate as "an effective deterrent to willful violations." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-26 (1985). The finding of willfulness that mandates an award of liquidated damages turns solely on the state of mind of the employer at the time of the underlying violation. Willfulness is present, and liquidated damages are thus required, if "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." Id. at 126. Such a finding of willfulness, like a finding of unlawful discrimination under *Price Waterhouse*, is thus not affected by what the employer may have learned at a point in time subsequent to the violation.

The Sixth Circuit's total denial of all monetary relief in after-acquired information cases is inconsistent with *Albemarle's* explanation that monetary awards provide an essential incentive for compliance with the law.

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices . . . ."

Albemarle Paper Co., v. Moody, 422 U.S. at 417-18. Under the Sixth Circuit rule, however, instead of fearing the "reasonably certain prospect of a [monetary] award", employers are reassured by the prospect that an after-acquired information defense may be found for any illegality, a prospect which one lawyer giddily described as "akin to winning the lottery."[43] Rather than re-examining whether

[43]*Lawyers Weekly USA*, June 21, 1993, p. 1, col. 1; see also id. ("Some defense attorneys are now routinely 'digging up dirt' on plaintiffs and using it to obtain summary judgment").

their practices are in compliance with federal law, employers are now being admonished to re-evaluate whether their practices maximize the likelihood that they will be able to invoke after-acquired evidence to escape responsibility for violations of federal law[44], and are being urged to comb through old resumes looking for misstatements.[45] Rather than increasing employment opportunities, the Sixth Circuit per se rule has prompted employers' counsel to urge that

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[44]G. Mesritz, "'After-Acquired' Evidence of Pre-Employment Misrepresentations: An Effective Defense Against Wrongful Discharge Claims", 18 *Employee Relations L.J.* 215, 215 ("Employers . . . should maximize the probability that 'after-acquired' evidence is available as a defense by revising employment applications to elicit even more specific information"), 222("[A]pplications should be revised to maximize the availability of the 'after-acquired' evidence defense. Questions about education and employment should require degrees obtained, dates of employment, reason for leaving, and addresses of all schools and previous employers. . . . Additionally, applicants should be required to identify all positions held with each previous employer and to describe duties and responsibilities for each position."), 222(employer written rule that workers may be fired for false statements in job applications "should *not* refer to 'intentional' or 'material' misrepresentations. . . [E]mployers should not limit their right to discharge only for 'material' misrepresentations.")(1992). The article notes that the author is "one of the attorneys who defended the *[Johnson v.] Honeywell* litigation." Id. at 215.

[45]Id. at 215 ("Management attorneys should respond to [the Sixth Circuit decision in *Johnson*] by routinely searching for pre-employment misrepresentations as a potentional defense . . ."), 224 ("Investigating for 'after-acquired' evidence should include subpoenas to all educational institutions and previous employers for all documents concerning plaintiff. Physicians and mental health care professionals also should be subpoenaed to determine whether plaintiff's representations . . . were truthful. Courts located where plaintiff has resided should be contacted . . . . Additionally, the employer should conduct an internal investigation for misconduct that, although unknown at the time of discharge, may support an 'after-acquired' evidence defense.")

more employees be ruthlessly dismissed, even for relatively minor infractions, in order to provide a basis for later arguing that civil rights plaintiffs too would have been discharged.[46]

The only passage in the decision below intimating any reason *why* after-acquired information should be such a complete bar to relief is a puzzling remark that such information, although it "could not have been the actual cause of the employee's discharge, . . . was relevant and determinative as to the employee's claim of injury . . . ." (Pet. App. 5a). This appears to echo a briefer and even more cryptic assertion in *Milligan-Jensen* that the plaintiff there had suffered "no legal damage." 975 F. 2d at 305. These epigrammatic arguments are difficult, not only to understand, but even to reconcile, since *Milligan-Jensen* asserts, to justify its statement that there is no "legal damage", that "the problem [is] one of causation", id. at 304, which is precisely the explanation which the Sixth Circuit in the instant case disavowed. Whatever these opaque passages may mean, if petitioner can prove the allegations of her complaint, that will demonstrate, as a matter of common sense, ordinary English, and law, that petitioner was in fact injured, and that the cause of that injury was harassment, unequal pay and ultimately discharge on the basis of her age. If petitioner can establish these facts, she would unquestionably be entitled to relief.

In sum, after-acquired information which would have prompted an employer to dismiss a plaintiff may limit, but will not bar entirely, relief in an employment discrimination

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[46]Id. at 223 ("*If a misrepresentation is disclosed, the applicant should not be hired, no matter how impressive the applicant is otherwise. . . .* Misrepresentations discovered after an employee is hired should result in immediate discharge. *Uniform application of the rule prohibiting pre-employment misrepresentations is critical.*")(Emphasis in original)

case. Reinstatement and front pay will, at least ordinarily, be unavailable. Back pay in a discharge case will run until the point in time at which the employer can establish it would have acquired the information and would have dismissed the plaintiff.[47] Compensatory damages for harassment, liquidated damages for willful violations, and punitive damages where otherwise appropriate will not be affected even if an employer succeeds in establishing an after-acquired information defense.

V. THE DECISIONS BELOW MUST BE REVERSED

In light of the foregoing analysis, the decision of the courts below dismissing the complaint must for several distinct reasons be overturned.

First, the dismissed complaint sought compensatory damages for harassment, back pay for a denial of back pay, and liquidated damages for willful violations of the ADEA. None of these remedies should be affected by the proffered after-acquired information.

Second, insofar as the complaint seeks back pay for unlawful discharge, the after-acquired information defense, if successful, might reduce, even substantially, that award, but could not eliminate it entirely. If, for example, respondent can prove that it would have acquired the relevant information and would have dismissed petitioner shortly after the actual October 1990 discharge date, it will reduce this aspect of its back pay liability to a relatively nominal amount. At this stage, however, respondent has not adduced any evidence, or even made any allegation, regarding when it would have acquired that information "but for" the alleged statutory violation.

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[47]If that date cannot be established, back pay will, unless other limiting circumstances are present, run until the date of judgment.

Third, in evaluating the after-acquired evidence defense, the district court misapprehended which party bears the burden of proof on that issue. A defendant that seeks to reduce its liability for unlawful discrimination by asserting that it would have dismissed a plaintiff on the basis of some legitimate reason, after-acquired or not, bears the burden of proving that assertion. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 n. 11, 250, 252, 258 (1989); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983); *Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977); *Village of Arlington Heights v. MHDC*, 429 U.S. 252, 270 n.21 (1977); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977). The district court thus erred when it held that dismissal of the complaint was required because petitioner had "brought forth no evidence tending to prove that the Banner would have continued her employment had it learned of her misconduct prior to her termination." (Pet. App. 17a).

It is equally clear that, regardless of which party bore the burden of proof, the question of whether respondent would have dismissed petitioner on the basis of the after-acquired information is one which in this case, at least, cannot be resolved on summary judgment. Respondent candidly acknowledges that there is a dispute as to whether petitioner's asserted misconduct was "serious enough to warrant termination." (R.Br. Op. 3). More fundamentally, here, as will often be the case, the dispute regarding whether the petitioner would have been dismissed is inextricably intertwined with the merits of petitioner's claims. The after-acquired information defense raised by respondent is similar to the argument advanced by the employer in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), that it had refused to hire Green because of his involvement in a stall-in that obstructed access to the company plant. This Court held that in assessing that claim, the finder of fact should consider the defendant's "general policy and practice with respect to minority employment." 411 U.S. at 804-05.

Similarly, in the instant case a demonstration that respondent had discriminated against petitioner on the basis of age through harassment, denial of raises and dismissal would be persuasive evidence that any hypothetical after-acquired information dismissal would also have been age based. The particular company officials on whose affidavits respondent relies in its after-acquired information defense are the very same individuals whom petitioner alleges orchestrated a year long intentional violation of the ADEA.[48] If the finder of fact rejects testimony by those officials regarding that discrimination, that conclusion will obviously affect its assessment of the credibility of their testimony regarding the after-acquired information defense. *Price Waterhouse v. Hopkins*, 490 U.S. at 252 n. 14.

In support of its contention that it would have fired petitioner based on the after-acquired information, respondent submitted four similarly worded conclusory affidavits to that effect from company officials. (J. App. 35a-43a). The Sixth Circuit apparently regarded those affidavits as sufficient to meet respondent's burden of proof on that issue. In this regard as well the court of appeals departed from the holdings of this Court.

In *Price Waterhouse* this Court insisted that an employer could only meet its burden of proof by adducing "some objective evidence as to its probable decision in the absence of an impermissible motive." 490 U.S. at 252. The Court rejected the suggestion that an employer might do so merely by offering conclusory testimony that the employee would have been dismissed even in the absence of the unlawful motive. *Compare* id. at 252 n. 14 *with* id. at 261 (White, J., concurring). The EEOC has expressly endorsed

[48] Stoneking, Simpkins and McMillan were all named in the complaint as involved in the conspiracy. J. App. 7a-9a.

the *Price Waterhouse* requirement of objective evidence.[49] The employer could meet that burden, for example, by adducing proof that it had an "absolute policy"[50] of dismissing comparable offenders. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

The reason for this requirement of objective evidence is particularly apparent in an after-acquired information case. Assessment of such a defense requires a court to determine what would have occurred if the employer had taken no unlawful action, had had no impermissible motive, and had known facts which it did not know. Whether the employer would have fired the plaintiff on the basis of that after-acquired information is thus not a question about the state of mind of any actual personnel official or other individual, but a hypothetical construct arrived at by considering the actions of the plaintiff and the standards in fact applied by the employer at the relevant point in time. The employer's actual record in disciplining, or not disciplining, other employees[51] will often be the "truer

[49] *Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory*, EEOC Compl. Man. (BNA) 405:6915, 405:6925 ("the respondent must offer objective evidence . . . . [A] mere assertion of a legitimate motive, without evidence . . . would not be sufficient.")(quoting *Price Waterhouse*).

[50] Id. at 405:6926.

[51] *Welch v. Liberty Machine Works, Inc.*, 1994 WL 169682 *3 (8th Cir. 1994)("Allowing Liberty . . . to establish a purported policy of this nature solely on the contents of [a company official's] affidavit seems to us to be contrary to the dictates of *Mt. Healthy*. . . . [W]e believe that the employer bears a substantial burden of establishing that the policy pre-dated the hiring and the firing of the employee in question and that [its written] policy constitutes more than mere ... boilerplate. Liberty presented no other evidence of its policies. By itself, [the official's] affidavit is a self-serving document and does not establish the material fact that Liberty would not have hired Welch

[standard] than the dead words of written text", *Monell v. Department of Human Services*, 436 U.S. 658, 691 n. 56 (1978), particularly because in virtually all after-acquired information cases the relevant written standards stated only that an employee "could" be dismissed under the circumstances at issue.[52] Testimony or evidence regarding such actual practices would obviously be relevant and could in appropriate circumstances satisfy an employer's burden of proof[53], although the credibility and probativeness of the evidence would have to be determined at trial by the finder of fact.

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but for the misrepresentation. As the movant for summary judgment, Liberty bore the significant burden of establishing that it had a settled policy of never hiring individuals similarly situated to Welch."); *Leahey v. Federal Express Corp.*, 685 F. Supp. 127, 128 (E.D.Va. 1988)(after-acquired information defense would be too speculative to submit to a jury if not "anchored in evidence concerning defendant's procedures and practices.").

[52]*Kristufek v. Hussman Food Service Co.*, 985 F. 2d 364, 369 (7th Cir. 1993)("The principal evidence of the company policy appears on the employment application form which warns that 'any misstatement or omissions of material facts . . . may be cause for immediate dismissal.' 'May be' is not 'will be' and is not enough to avoid the proven charge of retaliatory firing"); *Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314, 326-27 (D.N.J. 1993)(employer handbook which stated disciplinary action for the misconduct "may include suspension, demotion, or discharge, depending upon the circumstances" insufficient to meet employer's burden of proof; "it does not state that all falsifications will result in dismissal, but merely that falsifications will be considered grounds for dismissal").

[53]*Redden v. Wal-Mart Stores, Inc.*, 832 F. Supp. 1262, 1266 (N.D.Ind. 1993)(employer demonstrated that a large number of employees had in fact been dismissed for the same misconduct); *Agbor v. Mountain Fuel Supply Co.*, 810 F. Supp. 1247, 1249 (D. Utah 1993)(dismissal of alien employee required by federal law).

But an affidavit or testimony which merely asserts in conclusory terms that an employer would have dismissed the plaintiff is not by itself sufficient to meet that burden. Such testimony obviously provides the finder of fact with no information whatever about the employer's actual practices. Such a bald assertion may reflect, not any consideration of the employer's past practices, but only the witness's personal attitude toward the plaintiff, an attitude all too likely colored by the charge of discrimination or an understandable desire to limit the defendant's liability. A witness who asserts that a plaintiff would have been dismissed, but says nothing about the employer's actual standards, is no more probative than a witness who asserts that a plaintiff would have been dismissed, but does not reveal the nature of the alleged misconduct involved. At best such a conclusion would mean that the witness claimed to have considered the employer's undisclosed past standards and applied them to his or her view of the facts of the controversy, thereby purporting to usurp the factfinding responsibilities of the judge or jury. Testimony or affidavits otherwise insufficient to meet an employer's burden of proof are not strengthened by the addition of rhetorical flourishes, such as assertions that the rule violation was "obvious" or that the asserted dismissal would have been "immediate."(J.App. 35a-43a).

Of course, a factfinder in possession of objective evidence about an employer's actual practices might choose to rely on the opinions of current or former employees, including the plaintiff or company officials, regarding how those standards would have been applied. But absent such objective evidence, ordinarily to be tested at a full due process hearing, regarding the actual standards of a particular employer, a court would often have no way of assessing the significance of conclusory testimony. Federal judges have little expertise in the often widely varying

personnel practices of American employers.[54] In assessing claims by employers that they would have dismissed a plaintiff for misstatements in a job application, some courts have asserted that "it simply strains credulity to accept that any reasonable management personnel"[55] would fail to fire workers guilty of that offense, while other courts have insisted that there were "many situations" in which employers would not dismiss workers whom they discovered after the fact to have made such misstatements.[56] The problem is not simply that one of these assumptions must be incorrect, but that courts have no basis--in the absence of objective evidence regarding a particular employer--for knowing which assumption is the correct one.

In a deposition in the instant case, when counsel for petitioner attempted to ask a company official how he would have responded if various extenuating circumstances had been considered, counsel for respondent repeatedly objected that the question was "hypothetical."(J.App. 68a) That objection illustrates the potential difficulty an employer may

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[54] The dress code at IBM is obviously very different from that at Apple; a federal court would have no way of knowing a priori whether to credit a conclusory affidavit that a software engineer would be fired for failing to wear a suit to work at Compaq.

[55] *O'Driscoll v. Hercules, Inc.*, 745 F. Supp. 656, 659 (D. Utah 1990), *aff'd* 12 F. 3d 176 (10th Cir. 1994). The plaintiff in this case had understated her age in her job application out of fear of age discrimination. The employer invoked that misrepresentation a full ten years after she had been hired.

[56] *Bonger v. American Water Works*, 789 F. Supp. 1102, 1106 (D. Colo. 1992)("There are many situations . . . in which an employer would not discharge an employee if it subsequently discovered resume fraud, although the employee would not have been hired absent that resume fraud. . . . For example, if the employee had been doing excellent work, if a great deal of resources had been invested in training the individual . . . .").

face in meeting its burden of proof. It may at times be impossible to determine whether a plaintiff would have been dismissed on the basis of after-acquired information, due to the complexities of the facts, the vagueness of the employer's standards, disputes about what a plaintiff actually did, or uncertainty regarding the impact of extenuating or aggravating circumstances. Should that be the case, the after-acquired evidence defense would necessarily fail.[57]

> The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

NLRB v. Transportation Management Corp., 462 U.S. 393, 403 (1983).

> In our adversary system, where a party has the burden of proving a particular assertion and where that party is unable to meet its burden, we assume that that assertion is inaccurate.

Price Waterhouse v. Hopkins, 490 U.S. at 246 n. 11. Thus if, on remand, respondent wishes to pursue its after-acquired information defense, it should be required to adduce objective evidence regarding the standards of conduct and levels of discipline which it had actually applied in the past. Should respondent be able to put forward such evidence, it will be up to the finder of fact to determine whether respondent has met its burden of demonstrating by a preponderance of the evidence that it would have dismissed petitioner on the basis of the after-acquired information.

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[57] *Proulx v. Citibank*, 681 F. 2d 199, 203 (S.D.N.Y. 1988)(reduction or denial of back pay based on after-acquired information may not be "based on speculation").

CONCLUSION

To summarize, on remand the merits of petitioner's discrimination claims should first be resolved. Only if discrimination is found will the after-acquired information defense need to be addressed. Should that issue then arise, the burden of proof will be on the respondent, as a proven discriminator, to prove that it would have discharged petitioner had it been aware of that information. If the employer can meet that burden, petitioner will not be entitled to reinstatement or front pay. If the employer can further establish that it would have discovered that information prior to the date of judgment, back pay for the unlawful discharge will cut off on the "but for" discovery date. The after-acquired information defense will not, however, affect petitioner's right to compensatory damages for harassment, to back pay for discrimination in compensation, or to liquidated damages for a willful violation of the ADEA

For the foregoing reasons, the decision of the Sixth Circuit should be reversed, and the case remanded for a trial on the merits.

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